Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act-- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

To: The Commission

COMMENTS OF LINDSAY TELEVISION, INC.

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I.
Summary

1. The retroactive imposition of auctions on pending comparative cases confiscates the investment of the applicants who must now purchase the frequency rights at market value contrary to the due process and implied equal protection provisions of the Fifth Amendment of the Constitution.

2. The Commission should revise its comparative criteria and process pending comparative cases based on those criteria. An illustrative form of revised criteria is provided.

3. Under established Commission and court precedent, special privileges should not be given to women or minorities in the broadcast auction rules. They will benefit, along with all others, from special privileges accorded to small business applicants.

II.
Identity of commenting party

4. The experience and credentials of Lindsay Television, Inc. to offer comments in this matter are these:

(a) In April 1986, Lindsay Television, Inc. filed an application for construction permit for a new television station on channel 64 in Charlottesville, Virginia, the home of the University of Virginia. Charlotteville also is the home of George Walton Lindsay, a long-time local businessman and community leader who formed the corporation for the purpose of owning and operating the station. There is only one existing commercial television station in this relatively small market (ranked #199). Channel 64 would provide a second local service and outlet for choices of network and other national programming. Moreover, channel 64 would provide service to areas and populations who receive little or no over-the-air conventional television broadcasting service. Four other entities also filed applications for the station. 1 FCC Rcd. 732.

(b) In November 1986 [seven months after Mr. Lindsay's application was filed], the FCC designated the applications for comparative hearing.

(c) In August 1988 [two years and four months after Mr. Lindsay's application was filed], following discovery and hearings, Judge Chachkin issued an initial decision granting Lindsay's application. At this point in time, two parties had dismissed their applications and two other parties still remained in the proceeding. One of those parties, Achernar Broadcasting

Company ("Achernar"), was disqualified for failure to locate its proposed transmitting facility outside the Quiet Zone, established by the FCC to protect the operation of the National Radio Astronomy Observatory (the "Observatory") at Green Bank, West Virginia. 3 FCC Rcd. 5421.

(d) In April 1989 [three years after Mr. Lindsay's application was filed], the Review Board remanded the matter to determine interference that would be caused to the Observatory by Acharnar and also by Lindsay, even though its proposed transmitting facility was located outside the Quiet Zone. 4 FCC Rcd. 3629.

(e) In February 1990 [three years and ten months after Mr. Lindsay's application was filed], following discovery and hearings which included expert testimony concerning the technical operation of the Observatory and the effect of intervening mountainous terrain on the propagation of the proposed signal of channel 64 in the westerly direction toward Green Bank, Judge Chachkin issued a decision denying both the Achernar and Lindsay applications. By this time, the only other remaining applicant had withdrawn, and the case was a two-applicant proceeding, i.e., Lindsay and Achernar, also the Observatory. 5 FCC Rcd. 962.

(f) In October 1990 [four years and six months after Mr. Lindsay's application was filed], the Review Board issued a decision holding that the award should be based on comparative considerations, rather than interference to the Observatory, and granted the Lindsay application. 5 FCC Rcd. 6309.

(g) In September 1991 [five years and five months after Mr. Lindsay's application was filed], the full Commission issued a decision denying both applications because of interference to the Observatory. 6 FCC Rcd. 5393.

(h) In March 1992 [five years and eleven months after Mr. Lindsay's application was filed], the full Commission issued a decision denying Lindsay's petition for reconsideration, arguing that the decision was a novel and unique deviation from the agency's consistent previous practice of never considering interference to the Observatory by transmitting facilities located outside the Quiet Zone, when evidence in the record showed that the Observatory's sensitive facility received interference from television stations as far away as Pennsylvania and Florida. 7 FCC Rcd. 1778.

(i) In September 1992 [six years and five months after Mr. Lindsay's application was filed], the Mass Media Bureau denied Lindsay's informal objections to renewal applications of 47 television stations in Maryland, Virginia, West Virginia and the District of Columbia based on interference caused to the Observatory from transmitting locations outside the Quiet Zone. 7 FCC Rcd. 6284.

(j) In May 1994 [eight years and one month after Mr. Lindsay's application was filed], the full Commission denied Lindsay's application for review of that action. 9 FCC Rcd. 2143.

(k) In October 1995 [nine years and six months after Mr.

Lindsay's application was filed], the Court of Appeals reversed the Commission for its arbitrary and capricious handling of the Observatory interference issue in this proceeding. Achernar Broadcasting Company v. FCC, [78 RR2d 1369] (D.C.Cir.).

(1) In November 1997 (eleven years and seven months after Mr. Lindsay's application was filed), after protracted engineering studies, evaluations of numerous potential transmitting locations, and negotiations among the parties led to an accord between the applicants and the Observatory, both Lindsay and Achernar filed amendments of their applications containing identical technical proposals that are acceptable to and not opposed by the Observatory. The proposed facilities involve a severe null toward West Virginia that will require the design, manufacture and testing (under the joint supervision of engineers for the applicants and the Observatory) of an extraordinary, highly-specialized antenna. The parties have also studied, developed and negotiated mutually acceptable television translator proposals to fill in populated portions of the null at Staunton and Waynesboro, Virginia, in the Shenandoah Valley to the west of Charlottesville.

5. As of this writing, Achernar and Lindsay have reached accord on a resolution of their comparative cases and will file a joint request for settlement of the proceeding, along with acceptance of the amended joint technical proposal, within the statutory 180-day window for settlements that closes February 1, 1998. However, given today's filing deadline, these protective

comments are offered in the event that, for whatever reason, the settlement might not be approved.

III.
It is unlawful to impose an auction mechanism for the sale of the frequency at market value to citizens who have made their investment in reliance on a comparative selection mechanism

6. The Balanced Budget Act of 1927 permits, but does not require, the FCC to auction channel 64 at Charlottesville. 47 U.S.C. §309(l). This statute is unlawful, as would be Commission implementation of an auction of channel 64 pursuant to the statute. It effectively confiscates the investment of Mr. Lindsay in filing and litigating his application for nearly twelve years. Mr. Lindsay must either pay money into the United States Treasury in order to buy the rights to the frequency at market value or else abandon his nearly twelve-year investment altogether. This is a taking of Mr. Lindsay's property under the Fifth Amendment of the Constitution. Moreover, under the lottery provisions of 47 U.S.C. §309, other citizens file applications with advance knowledge of the use of the auction mechanism and can plan their investments accordingly. Imposition of the auction mechanism denies citizen Lindsay the implied equal protection of the laws under the Fifth Amendment of the Constitution.

7. This taking of property and denial of implied equal protection are to be done without due process of law. The operation of the statute, and of any Commission regulations implementing the statute, as applied to channel 64 in

Charlottesville, is arbitrary and capricious, and there is no arguably rational reason to explain it.

(a) The need for the agency to fix its comparative criteria is no such reason. The Commission and its predecessor agency, the Federal Radio Commission, have been successfully allocating frequencies and awarding licenses relative to the various types of communications uses for 71 years since 1927. These agencies have been able to devise and implement regulatory mechanisms geared to the public interest which, with rare exceptions, have been found to be lawful. On those occasions when a given aspect of the agency's work has been found wanting, the Commission has corrected the deficiency and continued on with its business. So, too, it should been with regard to the December 1993 court decision in Bechtel v. FCC, 10 F.3d 875 (D.C.Cir.), which struck down a portion of only one of eight comparative criteria. One illustrative way in which the comparative criteria may be adjusted is set forth infra. The agency's four-year paralysis on this score, for whatever reason, which to our knowledge has never been rationally explained, is no excuse.

(b) A legislative purpose to clear out pending comparative cases in an administratively expedient way is not an arguably rational reason for the retroactive imposition of the auction mechanism to Mr. Lindsay's application. An administratively expedient way to do that is to change to a lottery mechanism, employed in various other contexts, which would redirect Mr. Lindsay's nearly twelve-year investment, not obliterate it.

(c) A legislative purpose to balance the nation's budget cannot arguably justify the blind-sided confiscation of the investment of a single citizen in this manner.

8. The precedent cited in the Commission's notice of proposed rulemaking released November 26, 1997, at ¶¶13-15, do not support a retroactive application of the auction mechanism to Mr. Lindsay's application. Each will be discussed in turn.

9. Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289 (D.C.Cir. 1989) involved a comparative proceeding for the award of an instructional television license in which the Commission's comparative criteria were followed as previously announced and relied upon by the applicants, i.e., favoring a local educational applicant over an outside educational applicant. There was no change in the groundrules on that score. The outside educational applicant sought to assert the right to have an evidentiary comparative hearing, rather than an administrative comparative processing of the applications, and the court upheld the Commission's procedure to decide such cases without an evidentiary comparative hearing.

10. Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C.Cir. 1987) involved comparative applications for a cellular radiotelephone license for which the groundrules were changed from certain comparative criteria to the use of a lottery mechanism. The court affirmed the Commission's change in the groundrules. The differences between Maxcell and Mr. Lindsay's application are decisional:

(a) Before the Maxcell party filed its application, the FCC had already given public notice that it might change to the lottery mechanism. Mr. Lindsay did not learn of the change to the auction mechanism until after nearly twelve years of litigation.

(b) The change to the lottery mechanism in Maxcell came before the applicant had incurred litigation costs under the comparative hearing procedure, and thus saved the applicant large sums of money in the prosecution of its application. In Mr. Lindsay's case, the change occurred after two full hearings before the Administrative Law Judge, two full proceedings before the FCC's appellate Review Board, four applications for review or petitions to the full Commission or its Mass Media Bureau, an appeal to the Court of Appeals, and remand proceedings before the Commission.

(c) In Maxcell, the regulatory change converted the applicant's investment from a prospective hearing procedure to participation in a lottery as a means of winning. In Mr. Lindsay's case, his investment is simply wiped out. His choices are two, either to walk away from the investment or, in effect, pay twice for the frequency, a governmental form of "double dipping."

11. Chadmoore Communications, Inc., 113 F.3d 235 (D.C.Cir. 1997) involved a party who had duly received the wide-area specialized mobile radio (SMR) license for which it applied. The issue in the case was the validity of a subsequent rule change

reducing the time period for completion of construction of the SMR system. On the facts, the court upheld the Commission's rule change as applied to this licensee.

12. DIRECTV, INC. v. FCC, 110 F.3d 816 (D.C.Cir. 1997) involved parties who had duly received the licenses for direct broadcasting to homes from satellites (DBS), for which they had applied. At one point in time, the FCC stated that if certain other DBS channels were reclaimed from another party, the extra DBS channels would be reallocated pro-rata to these licensees. Instead, the FCC decided to put the reclaimed DBS channels out for auction, and the court affirmed. The complaining licensees got what they applied for. They didn't get any bonus frequencies, for which they must pay the market price if they want them. Otherwise, these parties will continue owning and operating the DBS channels duly licensed to them. Their investment was not extinguished by legislative fiat more than a decade after their applications had been filed and while they still waiting for an agency decision.

IV.
For applications filed prior to July 1, 1997, or, at the minimum, those filed prior to the 1994 freeze, modified comparative criteria should be adopted and implemented

13. For the reasons stated above, and as a matter of sound and fair regulatory policy, the Commission should correct its comparative criteria and apply the criteria to all competitive broadcast applications filed prior to July 1, 1997, or, as a minimum matter, all competitive broadcast applications filed

prior to the freeze announced on February 25, 1994. FCC Freezes Comparative Hearings, 9 FCC Rcd. 1055.

14. As an illustrative example, set forth below is a form of regulation establishing modified comparative criteria:

> The provisions of this subsection apply to comparative broadcast proceedings involving applicants for only new facilities that were filed on or before July 1, 1997 [or February 24, 1994]:
>
> A. The comparative criteria shall consist of:
>
> (1) Broadcast experience, (2) broadcast record, (3) local residence in the proposed service area and (4) civic activity in the service area, of parties in the applicant, proportionate to their equity interests (regardless of whether the equity is voting or nonvoting), without regard to their proposed role in management, minority status or gender;
>
> (5) Efficient use of frequency;
>
> (6) Diversification of control of the media of mass communications;
>
> (7) Daytime AM station ownership; and
>
> (8) Auxiliary power facilities.
>
> B. Existing records regarding comparative issues will not be reopened for new evidence. The applicants in such cases may file proposed findings of fact and conclusions of law, and exceptions and briefs, and responsive pleadings, addressed to the existing hearing records under the eight comparative criteria in A. Administrative Law Judges and the Commission shall render initial and final decisions based thereon.

15. Part A of the regulation states the long-standing criteria of the FCC, excluding only that portion of the criterion of "integration of ownership and management" struck down in Bechtel v. FCC, and the preferences for minority and female ownership struck down in or contrary to Aderand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995) and Lamprecht v. FCC, 958

F.2d 382 (D.C.Cir. 1992). The regulation eliminates the former policy to elevate the "Mom and Pop" style of management as superior to the "Corporate America" style of delegated management to the point where evidence of the former was admitted and evidence of the latter was excluded. The regulation substitutes all forms of ownership without regard management selected by that ownership.

16. Part B of the regulation permits the FCC to process comparative cases for which hearing records have already been completed without reopening the closed records, while providing applicants the opportunity to brief their cases under the revised criteria. There is no unfairness to the parties, whose applications were filed based on the broadcast experience and records, local residence and civic activities of the parties, their proposed signal coverage and their impact on the principle of favoring diversity of ownership of media of mass communications. The revised criteria only make adjustments to remove the "integration" gloss on the parties' credentials and to follow judicial decisions relative to minority and gender-based preferences.

17. There is no change in established FCC rules and procedures providing that applicants disqualified from becoming an FCC broadcast licensee for financial, technical, character or other grounds are not entitled to comparative consideration.

V.
There should be no privileges in the auction rules for women or minorities

18. The Commission has already held that the law of the land does not allow special privileges for women or minorities in the auction of public frequencies. Sixth Report and Order, 11 FCC Rcd. 136 (1995). This determination has been upheld on appeal. Omnipoint v. FCC, 78 F.3d 620 (D.C.Cir. 1996).

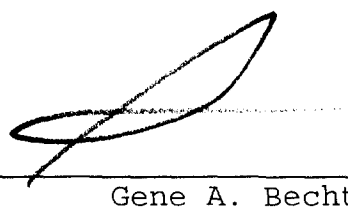
19. With regard to special privileges for women, the Lamprecht decision, supra, struck down comparative hearing preferences as unconstitutional and, as noted in the Commission's notice of proposed rulemaking at ¶90, the Supreme Court in United States v. Virginia Military Institute, 116 S.Ct. 2264, 2274-76 (1996), held that distinctions based on gender must be supported by "exceedingly persuasive justification."

20. With regard to special privileges for minorities, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) reversed the holding in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) that minority-based preferences in broadcast proceedings were constitutional.

21. As noted by the Commission and the court in the Sixth Report and the Omnipoint decision, many women and minorities own small businesses and they, along with others, will benefit from

the auction preferences accorded to all small businesses.

Respectfully submitted,



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